Supreme Court, U. S.
FILED
JUN 16 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1628

MARILYN THRELKELD, et al.,

Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF AMICUS CURIAE RAISING A QUESTION OF MOOTNESS FOR THE STATE OF MINNESOTA BY ITS ATTORNEY GENERAL WARREN SPANNAUS

WARREN SPANNAUS
Attorney General
State of Minneosta
By RICHARD B. ALLYN
Solicitor General
And PAUL G. ZERBY
Special Assistant Attorney General
160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2622
Attorneys for Amicus Curiae State of Minnesota

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This brief *amicus curiae* is filed by the State of Minnesota pursuant to Rule 42(4) of the Rules of this Court.

INTRODUCTION AND STATEMENT OF INTEREST

The instant appeal is from the judgment of the Supreme Court of Minnesota, entered on 11 February, 1976, which sustained against a federal constitutional due-process challenge * * * Minnesota Statutes Sections 179.65, subd. 2, 179.68, subds. 1, 3(1), and 179.76." (J.S. pp. 1, 3-4.)

The Jurisdictional Statement, dated 7 May, 1976, sets out those provisions as they stood "at the time of the decision of the Supreme Court of Minnesota". (J.S. pp. 4-5.)

The purposes of this brief *amicus curiae* are (1) to aid the Court in reaching an informed determination by bringing to its attention the amendments to Minn. St. 179.65, subd. 2, made by Minn. H. F. No. 2244 which became effective April 1, 1976 (cf. *Fusari v. Steinberg*, 419 U.S. 379, 387 n. 12 reh'g denied 420 U.S. 955); and (2) to demonstrate that here, as in *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415, the appropriate disposition in light of the change in the underlying State statute is to "remand the case to the [Minnesota courts] with leave to the appellant sto amend their pleadings". (See also *Fusari, supra; White v. Regester*, 422 U.S. 945; *Hill v. Printing Industries of Gulf Coast*, 422 U.S. 937; and *Omaha National Bank v. Nebraskans for Independent Banking, Inc.*, —— U.S. ——, 44 Law Week 3700, No. 75-1382, June 7, 1976.)

STATEMENT OF THE CASE

As the Supreme Court of Minnesota explained, Minn. St. 179.65, subd. 2, the provision at the heart of this case

> "is a part of the Public Employees Labor Relations Act (PELRA), Minn. St. 179.61 to 179.77. The purpose behind PELRA is to 'promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.' §179.61. The legislature recognized that 'unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary' to fulfill this purpose. Id. As a result, PELRA provides that any bargaining unit of employees may elect by majority vote an employee organization representative who shall then be certified as the 'exclusive representative of all employees in the unit' §179.67, subd. 12. The act contemplates that all employees in a given bargaining unit are entitled to share equally in the benefits obtained by the exclusive representative through negotiations or grievance proceedings. Consequently, the act provides in §179.65, subd. 2:
>
> "* * * [A]ll public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata

share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." (J.S. pp. 2b-3b.)

The appellants are employees of the Independent School District 281, Robbinsdale, Minnesota, who are represented by the Robbinsdale Federation of Teachers Local 872 (a labor organization selected as the exclusive bargaining agent by the School District employees in a secret ballot election) who have chosen not to become members of that Union. Pursuant to the provisions of Minn. St. 179.65, subd. 2, Local 872 notified the School District that a fair share contribution should be checked off from the earnings of the non-member employees in the bargaining unit. This suit in the Minnesota courts seeking a determination as to "whether the fair share statute passes constitutional muster when neither it nor any of the other provisions of the PELRA specifically provides for a hearing prior to the imposition of the fair share fee upon non-members of" the Union followed.[1] (J.S. p. 5b); The trial court ruled that the fair share statute was unconstitutional (J.S. 1a-20a). The Supreme Court of Minnesota reversed (J.S. 1b-18b).

As noted above, after entry of the judgment but prior to the filing of the Jurisdictional statement, Minn. H. F. No. 2244, which makes the following amendments to the fair share statute became law:

[1] "An agreement was reached by the parties on December 18, 1974, which provided that all fair share funds withheld from the employees' paychecks would be placed in an escrow account pending final determination of this action." (J.S. 4b-5b.)

A bill for an act

relating to public employment labor relations; providing for determination of the fair share fee; providing for appeal of that determination; amending Minnesota Statutes 1976, Sections 179.63 by adding a subdivision; 179.65, Subdivision 2; 179.71, Subdivision 2; and 179.72, Subdivision 3.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1974, Section 179.63, is amended by adding a subdivision to read:

Subd. 19. "Fair share fee challenge" means any proceeding or action instituted by a public employee, a group of public employees, or any other person, to determine their rights and obligations with respect to the circumstances or the amount of a fair share fee assessment authorized by section 179.65, subdivision 2.

Sec. 2. Minnesota Statutes 1974, Section 179.65, Subdivision 2, is amended to read:

Subd. 2. Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the

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terms and conditions of employment for such employees with the employer of such unit. Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, ~~and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures,~~ in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefts financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer

shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to section 3 of this act.

Sec. 3. Minnesota Statutes 1974, Section 179.71, Subdivision 2, is amended to read:

Subd. 2. The director shall accept and investigate all petitions for:

(a) certification or decertification as the exclusive representative of an appropriate unit;

(b) mediation services;

(c) any election or other voting procedures provided for in sections 175.61 to 179.77;

(d) certification to the board of arbitration ;

(e) to hear and decide all issues in a fair share fee challenge .

Sec. 4. Minnesota Statutes 1974, Section 179.72, Subdivision 3, is amended to read:

Subd. 3. In addition to the other powers and duties given it by law, the board has the following powers and duties:

(a) to hear and decide issues relating to the meaning of the terms "supervisory employee", "confidential employee", "essential employee" or "professional employee", as defined by section 179.63;

(b) to hear and decide appeals from determinations of the director relating to the appropriateness of a unit under section 179.67;

(c) to approve or disapprove the rules and regulations promulgated by the director under section 179.71,

subdivision 5, clause (g) ;

(d) to hear and decide on the record from determinations of the director relating to a fair share fee challenge decided under section 3 of this act .

Sec. 5. [EFFECTIVE DATE.] This act is effective the day following final enactment and sections 3 and 4 shall apply retroactively to any proceeding presently pending challenging the circumstances and amount of a fair share fee.

ARGUMENT

The central point of the Jurisdictional Statement is that:

[This appeal squarely presents the question of whether Local 872, acting as an exclusive-bargaining representative under color of the Minnesota Public Employment Labor Relations Act of 1971 may seize and expend portions of nonunion employees'[2] wages without affording them notice and a prior hearing of some kind on the validity of its claim that the monies seized constitute no more than the limited "pro rata share of the specific expenses incurred for services rendered by [Local 872] in relationship to negotiations and administration of grievance procedures", as required by Minnesota Statutes Section 179.65, subd. 2 at the time of the decision of the Minnesota Supreme Court.] (J.S. pp. 9-10.)

The flaws in the appellants' argument are fully yet succinctly exposed by the opinion of the Supreme Court of Minnesota. Nevertheless, in light of this Court's obligation to decide only present live controversies, it would be inappropriate to enter into a full dress proof that the Supreme Court of Minnesota was clearly correct in upholding the validity of the fair share statute before it. For, as noted above (pp. 6-7) subsequent to the "decision of the Minnesota Supreme Court", Minn. St. 179.65, subd. 2, has been amended to provide that no monies may be deducted from the wages of employees who are not members of the exclusive bargaining representative to satisfy the fair share requirement of the Minnesota law unless the employee has been "provide[d with] advance written notice of

[2] Technically, appellants' reference to nonunion employees is incorrect. The employees are those not members of the exclusive bargaining representative.

the amount of the fair share fee assessment". Moreover, in the event that a non-union employee files a challenge to the amount of the assessment, the employer may not transmit to the exclusive representative any of that employee's wages until the Director of the Bureau of Mediation Services determines that the amount in question is in fact, as the Minnesota law requires, a "fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative [and] in no event . . . exceed[s] 85 percent of the regular membership dues." Rather, the "deductions for a fair share fee shall be held in escrow by the employer" pending that decision.

In sum, the Minnesota law as it now stands assures that an exclusive representative "may [not] seize and expend portions of non-union employes' wages without affording them notice and prior hearing of some kind on the validity of its claim that the moneys seized constitute no more than" the "fair share fee for services rendered by the exclusive representative" permitted by Minnesota law. (Cf. J.S. pp. 9-10.)

This case is therefore governed by *Diffenderfer v. Central Baptist Church*, 404 U.S. 412. There a declaratory judgment action was filed challenging Florida Statutes §192.06(4) which authorized "a tax exemption for church property used, *inter alia*, as a commercial parking lot". The constitutionality of the State law was upheld in the trial court. After probable jurisdiction was noted in this Court, the Florida Legislature replaced §192.06(4) with a new section (Fla. Stat. §196.192(2)) which provided "that church property is exempt from taxation only if the property is used predominantly for religious purposes and only 'to the extent of the ratio that such predominant use

bears to the non-exempt use' ". The Court stated (*id* at 414-415):

> We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *United States v. Alabama*, 362 U.S. 602, 604 (1960); cf. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969); *Hines v. Davidowitz*, 312 U.S. 52, 60 (1941). It is clear that the church parking lot which was the subject of the taxpayers' complaint is no longer fully exempt from taxation. If, in fact, it can be demonstrated that the lot is predominantly used for nonreligious purposes, it will receive no exemption whatever. "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals, supra*, at 48.
>
> This is not a case that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), nor is it the kind of case that may produce irreparable injury if not decided immediately, see, *e.g.*, *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Gray v. Sanders*, 372 U.S. 368 (1963). The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06 (4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.
>
> Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the

newly enacted legislation, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 and n. 2 (1950), we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings. *Bryan v. Austin*, 354 U.S. 933 (1957).[3]

As we have shown, in this case as in *Diffenderfer*, the Court is being asked to pass on a statute that no longer exists and to do so even though the appellants will not be irreparably injured if this matter is returned to the Minnesota courts in a manner which permits a challenge to the present fair share statute if the appellants wish to make such a challenge and which permits the Minnesota Courts to dismiss if the case is or becomes moot.[4]

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[3] See also *Fusari v. Steinberg*, 419 U.S. 379. That case was an appeal in which this Court was asked to review "the determination that the Connecticut 'seated interview' procedures for assessing continued eligibility for unemployment compensation benefits violates the due process clause of the Fourteenth Amendment." This the Court declined so to do on the ground that:

"Our independent examination of Connecticut law reveals that the State significantly revised its unemployment compensation system following the District Court's decision. Some of the amendments are designed to ameliorate problems that the court identified. In these circumstances, we think it inappropriate to decide the issues tendered by the parties. We therefore vacate the decision of the District Court and remand for reconsideration in light of the intervening changes in Connecticut law." (Id. at 379-380.)

[4] §5 of H.F. 2244, *supra*, assures that these appellants will be accorded the procedural protections provided by the present Minnesota law and the escrow agreement reached between the parties assures that in the event the appellants eventually prevail they will be made financially whole. We advise the Court that the Director of the Bureau of Mediation Services is proceeding to assert the jurisdiction conferred upon him by Section 5 of the new legislation.

For the information of the Court we note that a recent decision of the Court of Appeals for the Eighth Circuit considered a broad attack upon the Minnesota Public Employee Labor Relations Act; however with respect to the challenge insofar as it rested upon the fair fee provisions the Court stated:

"Following the district court's order of December 22, 1975, the Minnesota Supreme Court held that the fair share provision of the PELRA was not violative of due process. *See Robbinsdale Education Ass'n v. Robbinsdale Federation of Teachers, Local 872*, 239 N.W.2d 437 (Minn. 1976). On March 31, 1976, the Minnesota Legislature enacted Minn. H. F. No. 2244, *amending* Minn. Stat. Ann. § 179.65(2), which significantly alters the manner in which fair share fees are assessed and possibly renders this claim moot."

Knight, et al. v. The Honorable Albert D. Alsop, District Judge, United States District Court for the District of Minnesota, Slip opinion No. 76-1051, May 17, 1976, at p. 9, n. 10.

CONCLUSION

For the above stated reasons in light of the intervening change of law the judgment of the Supreme Court of Minnesota should be vacated and the case remanded to the Minnesota Courts with leave to the appellants to amend their pleadings and for dismissal if the case is or becomes moot.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
By RICHARD B. ALLYN
Solicitor General
And PAUL G. ZERBY
Special Assistant Attorney
General
160 State Office Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2622
Attorneys for Amicus Curiae
State of Minnesota